SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 437

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

vs.

W. H. HILLS

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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1 In the United States Circuit Court of Appeals for the Tenth Judicial Circuit

3497

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, APPELLANT

v.

W. H. HILLS, APPELLEE

Appeal from the District Court of the United States for the District of Kansas, First Division

In the above-entitled cause certain questions of law have arisen on the record with respect to which this court desires the instructions of the Supreme Court of the United States for the purpose of decision of such cause. Accordingly, a certificate of such questions has been prepared and duly signed by the Judges of this court sitting in said cause as follows:

Certificate of question of law

Statement of facts

2 This is an action for treble damages and for an injunction under the Emergency Price Control Act, as extended and amended (50 U. S. C. A. App., Sec. 901, et seq.), and under the Rent Regulation for Housing, as amended (8 F. R. 7322).

Hills, the defendant below, is the owner of certain housing accommodations located in Manhattan, Riley County, Kansas, and within the Junction City-Manhattan Defense Rental Area, and subject to rent regulation. The housing accommodations consist of six furnished apartments, two of which are not involved in this cause. The apartments were remodeled in 1943, and were registered within 30 days after they were first rented, as prescribed by Sec. 7 of the Regulation. Subsequent to such registration, and on December 17, 1943, the maximum rents were reduced by the then Rent Area Rent Director, C. B. Dodge, Jr., pursuant to Sec. 5 (c) of the Regulation. On March 7, 1945, B. W. Diggle, successor to Dodge as Area Rent Director, issued an order further reducing the maximum rents set by Dodge.

3 The cause was tried to the court without a jury. The parties stipulated that the only issue was the validity of the second order and that, if the second order was valid, the defendant made overcharges in the amount claimed in the complaint. On October 29, 1946, the trial court filed a written opinion in the cause in which he held that the burden was on the Administrator to establish the validity of the second order and that he had failed

to introduce proof establishing the validity of such order. On the same day, the court entered a judgment for Hills. The Administrator appealed.

On the date that the trial court handed down its opinion and entered its judgment, exclusive jurisdiction to pass on the validity of a regulation or order issued by the Administrator was vested in the Emergency Court of Appeals.

The appeal in this court was submitted on the 10th
4 day of September 1947. The Emergency Price Control Act of 1942, as amended and extended by the Price Control Extension Act of 1946, expired by its terms June 30, 1947.

Questions certified

(1) On remand, will the District Court of the United States for the District of Kansas, First Division, have jurisdiction to determine the validity of the second rent order and should we direct the District Court to pass on the validity of such rent order?

(2) If the first question is answered in the negative, does the Emergency Court of Appeals still have jurisdiction to determine the validity of the second rent order?

(3) If the second question is answered in the affirmative, and this court remands the cause with directions to enter judgment
5 as prayed for against Hills, may Hills, under Sec. 204 (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App., Sec. 924 (e)), apply to the District Court for leave to file in the Emergency Court of Appeals a complaint against the Administrator, setting forth objections to the validity of the second rent order, and, upon proper petition and showing, obtain the relief provided for in Sec. 204 (e), and should we so direct on remand?

ORIE L. PHILLIPS,
WALTER A. HUXMAN,
ALFRED P. MURRAH,
Judges of the United States Circuit Court of Appeals, sitting in said cause.

It is now here ordered by this court that such certificate be filed and entered of record in this court and that the original of such certificate be duly certified by the clerk of this court and by him duly transmitted to the Supreme Court of the United States for its action thereon.

6 In The United States Circuit Court of Appeals for The Tenth Judicial Circuit

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Judicial Circuit, do hereby

certify that the foregoing is a true copy of an order of this court entered on this 5th day of November 1947, in the cause numbered 3497, Philip B. Fleming, Temporary Controls Administrator, Appellant v. W. H. Hills, Appellee, as fully and completely as said order remains of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit at my office in the City of Wichita, Kansas, on the 5th day of November A. D. 1947.

[SEAL] ROBERT B. CARTWRIGHT,
Clerk, United States Circuit Court of Appeals for the Tenth Judicial Circuit.

United States Circuit Court of Appeals, Tenth Circuit

3497

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR, APPELLANT

vs.

W. H. HILLS, APPELLEE

Appeal from the District Court of the United States for the District of Kansas

It appearing to the court that the certificate of question of law in the above entitled cause, certified by the clerk of this court to the Supreme Court of the United States, contains an erroneous date in that the date of the order issued by B. W. Diggle further reducing the maximum rents set by Dodge is given as March 7, 1943, and that the correct date of such order is March 7, 1945, it is now here ordered that the certificate of question of law be corrected by changing the date March 7, 1943, appearing at the end of line four from the bottom of page two of such certificate, to March 7, 1945.

It is further ordered that the clerk of this court transmit a certified copy of this order to the clerk of the Supreme Court of the United States.

In The United States Circuit Court of Appeals For The Tenth Judicial Circuit

I, Robert B. Cartwright, Clerk of the United States Circuit Court of Appeals for the Tenth Judicial Circuit, do hereby certify that the foregoing is a true copy of an order of this court entered on this 11th day of November 1947, in the cause numbered 3497, Philip B. Fleming, Temporary Controls Administrator, Appellant

vs. W. H. Hills, Appellee, as fully and completely as said order remains of record in my office.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Tenth Circuit at my office in the city of Denver, Colorado, on the 11th day of November A. D. 1947.

[SEAL]

ROBERT B. CARTWRIGHT,
Clerk, United States Circuit Court of Appeals for the Tenth Judicial Circuit.

[Endorsement on cover:] File No. 52667. U. S. Circuit Court of Appeals, Tenth Circuit. Term No. 437. Certificate. Philip B. Fleming, Temporary Controls Administrator vs. W. H. Hills. Filed November 8, 1947. Term No. 437 O. T. 1947.

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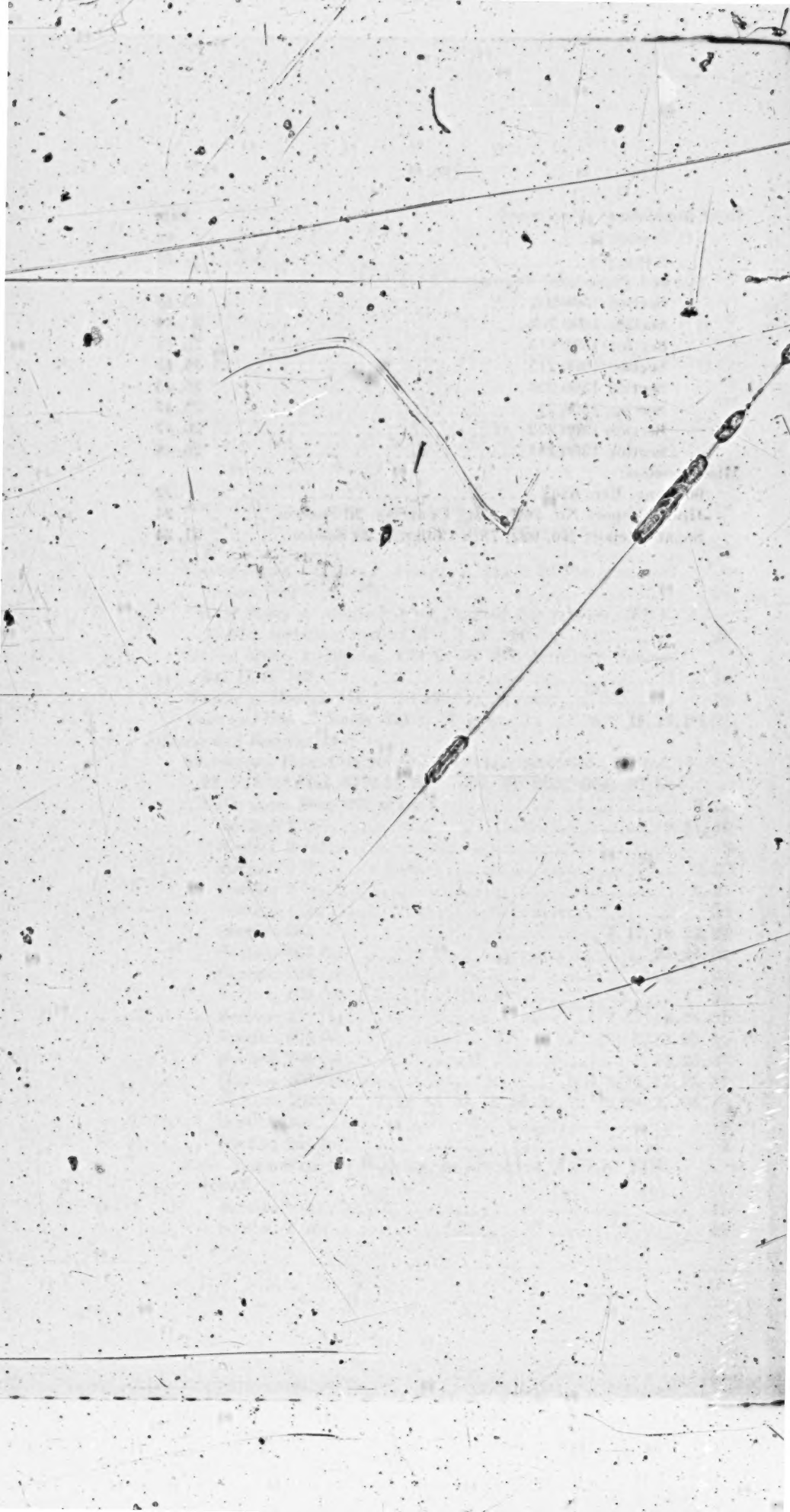

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 437

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

v.

W. H. HILLS

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE ADMINISTRATOR

OPINIONS BELOW

The case is here on certificate and the Circuit Court of Appeals wrote no opinion. The opinion of the United States District Court for the District of Kansas, First Division, is not reported.

JURISDICTION

The certificate of the Circuit Court of Appeals for the Tenth Circuit was filed with this Court on November 8, 1947. Jurisdiction of this Court is invoked under Section 239 of the Judicial Code, as amended (28 U. S. C. 346).

QUESTIONS CERTIFIED BY THE CIRCUIT COURT OF APPEALS

"(1) On remand, will the District Court of the United States for the District of Kansas, First Division, have jurisdiction to determine the validity of the second rent order and should we direct the District Court to pass on the validity of such rent order?

"(2) If the first question is answered in the negative, does the Emergency Court of Appeals still have jurisdiction to determine the validity of the second rent order?

"(3) If the second question is answered in the affirmative, and this court remands the cause with directions to enter judgment as prayed for against Hills, may Hills, under Sec. 204 (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App., Sec. 924 (e)), apply to the District Court for leave to file in the Emergency Court of Appeals a complaint against the Administrator, setting forth objections to the validity of the second rent order, and, upon proper petition and showing, obtain the relief provided for in Sec. 204 (e), and should we so direct on remand?".

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Emergency Price Control Act of 1942, as amended and extended (56 Stat. 23, 765; 58 Stat. 632; 59 Stat.

306; 60 Stat. 664; 50 U. S. C. App., Supp. V, 901 et seq.) and of the regulations issued thereunder, are set forth in the Appendix, *infra*, pp. 29–49.

STATEMENT

Three question have been certified to this Court by the Circuit Court of Appeals for the Tenth Circuit, for the purpose of deciding an appeal pending before it. This certificate of questions is based upon the following statement prepared by the Circuit Court of the pertinent facts in the case (Certif. 1–2):

"This is an action for treble damages and for an injunction under the Emergency Price Control Act, as extended and amended (50 U. S. C. A. App., Sec. 901 et seq.), and under the Rent Regulation for Housing, as amended (8 F. R. 7322).

"Hills, the defendant below, is the owner of certain housing accommodations located in Manhattan, Riley County, Kansas, and within the Junction City-Manhattan Defense Rental Area, and subject to rent regulation. The housing accommodations consist of six furnished apartments, two of which are not involved in this cause. The apartments were remodeled in 1943, and were registered within thirty days after they were first rented, as prescribed by Sec. 7 of the Regulation. Subsequent to such registration, and on December 17, 1943, the maximum rents were reduced by the then Area Rent Director, C. B.

Dodge, Jr., pursuant to Sec. 5 (c) of the Regulation. On March 7, 1945, B. W. Diggle, successor to Dodge as Area Rent Director, issued an order further reducing the maximum rents set by Dodge.

"The cause was tried to the court without a jury. The parties stipulated that the only issue was the validity of the second order and that, if the second order was valid, the defendant made overcharges in the amount claimed in the complaint. On October 29, 1946, the trial court filed a written opinion in the cause in which he held that the burden was on the Administrator to establish the validity of the second order and that he had failed to introduce proof establishing the validity of such order. On the same day, the court entered a judgment for Hills. The Administrator appealed.

"On the date that the trial court handed down its opinion and entered its judgment, exclusive jurisdiction to pass on the validity of a regulation or order issued by the Administrator was vested in the Emergency Court of Appeals.

"The appeal in this court was submitted on the 10th day of September 1947. The Emergency Price Control Act of 1942, as amended and extended by the Price Control Extension Act of 1946, expired by its terms June 30, 1947."

In connection with the certified statement of the court below that the Emergency Price Con-

trol Act expired on June 30, 1947, it will be observed, of course, that Section 1 (b) of that Act (the "saving" clause), *infra*, pp. 29–30, provides in part that:

> * * * as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders * * * shall be treated as still remaining in force for the purpose of sustaining any * * * action * * * with respect to such right, liability, or offense.

SUMMARY OF ARGUMENT

1. Section 204 (d) of the Act provides that the validity of regulations or orders may be considered only in the Emergency Court of Appeals, and on review in this Court, and expressly withdraws the determination of that question from all other courts. Although the Act expired on June 30, 1947, nevertheless by virtue of Section 1 (b) thereof, all provisions of the Act are treated as remaining in force for the purpose of sustaining any suit based upon a right or liability incurred, or offense committed, prior to the termination date. Among the provisions of the Act, which survive, are those found in Section 204 (d). Therefore, although the Act has terminated, the District Court nevertheless has no jurisdiction to determine the validity of regulations or orders in enforcement proceedings which are based upon

violations committed prior to the termination date of the Act.

2. The question whether the Emergency Court of Appeals still has jurisdiction to determine the validity of the rent order involved, is substantially answered by the reasoning set out in the preceding point. Moreover, since the Congress did not invest the enforcement courts with jurisdiction, upon the expiration of the Act, to determine the validity of regulations and orders, but did continue liability for violations occurring before the expiration date, it would be unreasonable to assume that it intended to divest the Emergency Court of that jurisdiction and thus leave those charged with liability without a judicial means of testing the validity of the regulations and orders that are pertinent to that liability. It is plain, therefore, that the Emergency Court of Appeals still has jurisdiction to pass upon the validity of the rent order here involved, and that court has repeatedly held that it has jurisdiction in such cases.

3. The substance of the third question is whether the defendant would on remand have the legal right to obtain permission to proceed in the Emergency Court of Appeals, and if so, whether the court below should direct the District Court to grant the defendant such permission.

Judgment was rendered by the trial court in the defendant's favor, and he has not, therefore,

had occasion to apply to the trial court for permission to proceed in the Emergency Court. Consequently, neither the trial court nor the court below has had an opportunity to consider whether the defendant has shown the factual prerequisites for invoking the aid of the Emergency Court, and it is not clear that a solution of the question is necessary to a decision in the case.

Should this Court consider that the question warrants an answer, it should be answered in the negative. On remand, the defendant would be required by Section 204 (e), *infra*, pp. 38–42, before he could obtain permission to proceed in the Emergency Court, to show the District Court that his objection to the regulation is made in good faith and that there is reasonable and substantial excuse for his failure to institute protest proceedings with the Administrator pursuant to Sections 203 and 204 (a) to (d), *infra*, pp. 32–38. The facts contained in the certificate are not sufficient to establish that the defendant has sustained this burden of showing that he has exhausted his administrative remedies. Consequently, an order by the court below directing the District Court to grant the defendant leave to proceed in the Emergency Court could be nothing less than arbitrary, and it would be an unwarranted encroachment on the discretion vested by the statute in the District Court.

ARGUMENT

I

NEITHER THE UNITED STATES CIRCUIT COURT OF APPEALS NOR THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS HAS JURISDICTION TO DETERMINE THE VALIDITY OF THE SECOND RENT ORDER INVOLVED IN THIS CASE AND, ACCORDINGLY, THE CIRCUIT COURT OF APPEALS SHOULD NOT BE ORDERED TO DIRECT THE DISTRICT COURT TO PASS ON ITS VALIDITY

The first question certified is, in substance, whether the District Court has jurisdiction to determine the validity of a rent reduction order in enforcement proceedings brought pursuant to Section 205 of the Emergency Price Control Act, as amended, and based upon violations of the order committed prior to June 30, 1947, the termination date of the Act. This question should be answered in the negative.

By Section 204 (d) of the Emergency Price Control Act of 1942, as amended, *infra*, pp. 37–38, any question of the validity of regulations or orders issued pursuant to Section 2 of the Act, whether challenged upon constitutional or statutory grounds, was withheld from the jurisdiction of all enforcement courts, both federal and state, and was committed to the exclusive jurisdiction of the Emergency Court of Appeals, subject only to review by this Court. *Yakus* v. *United States*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503; *Case* v. *Bowles*, 327 U. S. 92; *Lockerty* v.

Phillips, 319 U. S. 182. "The Emergency Court has power to review all questions of law, including the question whether the Administrator's determination is supported by evidence, and any question of the denial of due process or any procedural error appropriately raised in the course of the proceedings." *Yakus* v. *United States*, *supra*, at p. 437.

This exclusive jurisdiction clause covers any regulation or order issued under Section 2, thereby extending to all orders establishing maximum prices or rents, whether they be established directly in broad regulations (under Sections 2 (a) and 2 (b)), or established separately for individual sellers or landlords, pursuant to authority of the broad regulation (under Section 2 (c) of the Act). The significant reasons noted by this Court in the *Yakus* case (321 U. S. 414) for the exclusive jurisdiction plan (e. g., the need for uniformity of decisions; the necessity of avoiding delayed or unequal control and enforcement; the importance of fully utilizing the Administrator's specialized experience) all apply as fully to individual orders as they do to orders of general applicability. This Court has held that objections to the validity of an individual rent order could be made only in the Emergency Court. *Bowles* v. *Willingham*, 321 U. S. 503, 509–510, 521. Those circuit courts of appeals in which the question has arisen have decided

similarly. *Bowles* v. *Lake Lucerne Plaza,* 148 F. 2d 967 (C. C. A. 5), certiorari denied, 326 U. S. 726; *Creedon* v. *Babcock,* 163 F. 2d 480 (C. C. A. 4); *Bowles* v. *Meyers,* 149 F. 2d 440 (C. C. A. 4); *Porter* v. *McRae,* 155 F. 2d 213 (C. C. A. 10). The Emergency Court of Appeals has taken jurisdiction of protest proceedings against individual orders directing reductions of rent, and has both upheld and rejected them. *Womac* v. *Bowles,* 146 F. 2d 497 (E. C. A.); *Bell* v. *Fleming,* 159 F. 2d 416 (E. C. A.); *Polis* v. *Creedon,* 162 F. 2d 908 (E. C. A.); *Easley* v. *Fleming,* 159 F. 2d 422 (E. C. A.); *Fury* v. *Fleming,* 161 F. 2d 189 (E. C. A.).

Although the Emergency Price Control Act of 1942 expired on June 30, 1947, nevertheless under Section 1 (b) thereof, *infra,* pp. 29–30, the provisions of that Act are to be treated as still remaining in force for the purpose of maintaining any suit with respect to offenses committed or rights or liabilities incurred prior to the termination date of the Act. *150 East 47th Street Corporation* v. *Porter,* 156 F. 2d 541 (E. C. A.); *Korach Brothers* v. *Clark,* 162 F. 2d 1020 (E. C. A.); *Standard Kosher Poultry, Inc.* v. *Clark,* 163 F. 2d 430 (E. C. A.); *Talbot* v. *Woods* (E. C. A.) No. 438, decided November 7, 1947, not yet reported. See also *Fleming* v. *Mohawk Wrecking and Lumber Company,* 331 U. S. 111, 114.

Among the provisions of the Act which

survive by virtue of Section 1 (b), are those portions of Section 204 (d) which create the Emergency Court of Appeals, provide for its organization and operation, and confer exclusive jurisdiction upon it to determine the validity of any provision of a regulation or order issued under ~~Senate~~ Section 2 of the Act, together with those portions which expressly prohibit all other courts, federal, state or territorial, from passing upon the validity of maximum price and rent regulations and orders issued under the Act. *150 East 47th Street Corporation* v. *Porter, supra.* Since the instant case is based upon an offense committed, or right or liability incurred prior to June 30, 1947, and at a time when the Act was in full force and effect, it is clear that Section 204 (d), the effectiveness of which is saved by Section 1 (b), bars the District Court from exercising jurisdiction to determine the validity of the second rent order in this case, and thus requires a negative answer to the first question certified.

II

THE EMERGENCY COURT OF APPEALS STILL HAS JURISDICTION TO DETERMINE THE VALIDITY OF THE SECOND RENT ORDER

What has been said in Point I, *supra,* provides the answer to the second question certified to this Court as to whether the Emergency Court of Appeals still has jurisdiction to determine the validity of the second rent order. Moreover, since

the Congress did not vest jurisdiction in the enforcement courts to pass upon the validity of the price and rent regulations and orders after the expiration of the Act, it would be unreasonable to assume that it intended to divest the Emergency Court of Appeals of that jurisdiction and thus leave those who continued to be charged with liability incurred prior to the expiration of the Act destitute of a judicial means of testing the validity of such regulations and orders. Here, the defendant was charged with having violated the order of the Rent Director during a period when the Act, the Rent Regulation, and the Rent Director's order were still in full force and effect, and the present civil proceeding to recover statutory damages was, therefore, predicated upon violations of that order committed by him prior to the expiration of the Act. The Emergency Court of Appeals has expressly and repeatedly held that, in such circumstances, its ancillary jurisdiction under Section 204 of the Act to determine the validity of the regulation or order upon which the enforcement proceeding is based, was "preserved, after the termination date of June 30, 1947, by § 1 (b) of the Act." *Standard Kosher Poultry, Inc.* v. *Clark,* 163 F. 2d 430, 432; *Talbot* v. *Woods, supra; Korach Brothers* v. *Clark, supra.*[1]

[1] This conclusion is also implicit in the decision of the court below in *McRae* v. *Creedon*, 162 F. 2d 989 (C. C. A. 10), rendered on July 7, 1947 (after the expiration of the Act),

The holding of the Emergency Court in the above-cited cases was based on its reasoning in its previous decision in *150 East 47th Street Corporation* v. *Porter*, 156 F. 2d 541, wherein the question presented was whether the Emergency Court of Appeals continued in existence after June 30, 1946,[2] with judicial power to determine the validity of the rent reduction order issued in that case, for the violation of which there was then pending an enforcement proceeding in the Municipal Court of the City of New York. In holding that Section 204 of the Emergency Price Control Act remained in force after the Act expired on June 30, 1946, to the extent necessary to continue in the Emergency Court of Appeals exclusive jurisdiction to

directing the district court to grant appellant's application for leave to file a complaint in the Emergency Court of Appeals pursuant to Section 204 (e) of the Act.

[2] The Emergency Price Control Act of 1942, as amended, expired by its own terms on June 30,, 1946, and until July 25, 1946, when it was re-enacted, that Act and the regulations and orders issued thereunder were not currently in effect. The Price Control Extension Act of July 25, 1946 (60 Stat. 664, 678), was made effective as of June 30, 1946, and provided that the regulations and orders issued under the Price Control Act which were in effect on June 30, 1946, should be in effect as if the re-enactment had taken place on June 30, 1946, except that no act or transaction or omission or failure to act occurring subsequent to June 30, 1946, and prior to July 25, 1946, should be deemed to be a violation of the Price Control Act or of any regulation or order issued thereunder. The *East 47th Street Corporation* case was decided by the Emergency Court of Appeals between June 30, 1946, and July 25, 1946, when there was no federal price control legislation currently in effect.

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determine the validity of the order, the Emergency Court said:

> The act was drawn upon the principle that exclusive jurisdiction to pass upon questions of validity should center in this court and the Supreme Court. There is no suggestion in section 1 (b) that this statutory plan was to be changed with respect to litigation pending after the act's termination date and that the complex relationship between enforcement proceedings in other courts and review proceedings in this court provided by section 204 was then to be abandoned. [p. 544.]
>
> For all the reasons stated we conclude that the provisions of section 204 of the act which establish this court, provide for its organization and operation and define its jurisdiction and powers remain in force after June 30, 1946 for so long a time as may be necessary to enable the court to hear and determine all proper suits within its jurisdiction in which retrospective declarations of invalidity are sought with respect to regulations or orders the violation of which prior to June 30, 1946 has formed the basis for prosecutions or suits in other courts. [p. 545.]

For the reasons shown above, the Emergency Court of Appeals still has jurisdiction to determine the validity of the second rent order involved in this case and the second question certified should be answered in the affirmative.

III

THE FACTS STATED IN THE CERTIFICATE ARE NOT SUFFICIENT TO SHOW THAT THE DEFENDANT WOULD, UPON REMAND, BE LEGALLY ENTITLED TO OBTAIN PERMISSION TO PROCEED IN THE EMERGENCY COURT OF APPEALS PURSUANT TO SECTION 204 (E) OF THE ACT, AND THE COURT BELOW SHOULD NOT DIRECT THE DISTRICT COURT TO GRANT THE DEFENDANT LEAVE TO PROCEED

The third question certified is whether the defendant may, under Section 204 (e) of the Act, *infra*, pp. 38–41, apply to the District Court for leave to file ~~a complaint~~ in the Emergency Court of Appeals a complaint setting forth his objections to the validity of the second rent order and upon a proper showing obtain the relief provided for in that Section, and should the court below, if it reverses the judgment of dismissal, so direct on remand. Thus, the third question has a double aspect, although its two parts appear to be interdependent.

In the first part of the question the court below used the language, "* * * *may* Hills * * * *apply* to the District Court for leave to file in the Emergency Court of Appeals a complaint * * *." [Italics supplied.] Reading this language literally, we should, of course, be concerned as to whether it presents any substantial legal problem for solution, since we cannot conceive that the court below could encounter any difficulty in determining that the defendant

might, on remand, properly file with the District Court at least an application for permission to file a complaint in the Emergency Court of Appeals. In view of this concern, we do not urge that the language used by the court below in the first part of the third question be read literally, since we apprehend that to do so would not aid in solving the problem which that court has endeavored to present. We deem it reasonable to assume, and we therefore so assume for the purposes of our argument on this question, that the court below in framing the entire third question as it did, intended to ask this Court whether the defendant, on the facts stated in the certificate, would, on remand, have a legal right to obtain an order from the District Court granting him leave to file a complaint in the Emergency Court of Appeals, and if so, should the court below direct the District Court to grant him that leave.

It will be observed that in this case judgment was rendered in the defendant's favor by the trial court (Certif. 2), and that the defendant has had no occasion or need up to this time to apply to the District Court for leave to file a complaint in the Emergency Court pursuant to Section 204 (e) of the Act. Hence, neither the trial court nor the court below has as yet had an opportunity to consider whether the defendant has shown the factual prerequisites for invoking the aid of the Emergency Court of Appeals under

Section 204 (e). Thus to that extent, at least, the third question may be improperly certified, since the answer to it depends upon another issue not yet resolved by the courts below, and since it is not clear that the answer to it is necessary to a decision in the case. Cf. *Busby* v. *Electric Utilities Union*, 323 U. S. 72, 75. If, however, this Court feels that the third question is one of sufficient general importance to warrant its consideration and thus put at rest existing doubts concerning it, then, we submit that the question should be answered in the negative.

The Emergency Price Control Act of 1942, as amended, provides two modes of procedure whereby the constitutionality or statutory validity of orders and regulations establishing maximum rents and prices may be judicially reviewed. The first mode of procedure may be resorted to as of right; the second may be resorted to only with the permission of a court in which a proceeding to enforce the order or regulation is pending, which permission may be granted or withheld by the court in the exercise of a sound judicial discretion.

The first mode of procedure is provided by Sections 203 and 204 (a) to (d) of the Act, *infra*, pp. 32–38. Under this mode of procedure, any person subject to any provision of any regulation or order promulgated under the Act may file a protest with the Administrator setting forth his

objections to any provision and, in support thereof, submit affidavits and other written evidence. Section 203, *infra*, pp. 32–34. If the protest is denied in whole or in part, the protestant who feels aggrieved may file a complaint in the Emergency Court of Appeals praying that the regulation or order be enjoined or set aside in whole or in part. Section 204 (a), *infra*, pp. 34–36. If the Emergency Court of Appeals determines that the provision is arbitrary, or capricious, or is not in accordance with law, it may set the order or regulation aside. Cf. *Lockerty* v. *Phillips*, 319 U. S. 182; *Yakus* v. *United States*, *supra*; *Bowles* v. *Willingham*, *supra*.

The second mode of procedure for testing the validity of an order or regulation issued under the Act is provided by Section 204 (e) of the Act, *infra*, pp. 38–41, which was added thereto by the Stabilization Extension Act of 1944 (58 Stat. 632, 639). Under this mode of procedure a defendant who has not followed the first mode of procedure and against whom a civil or criminal proceeding has been brought under Section 205 to enforce any provision of any order or regulation issued under the Act may, within thirty days after arraignment in a criminal case or within five days after judgment in any civil or criminal proceeding, apply to the court in which such proceeding is pending for leave to file in the Emergency Court of Appeals, a complaint against the Admin-

istrator setting forth his objections to the validity of any provision which the defendant is alleged to have violated. The enforcement court may grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a)." Section 204 (e) (1), *infra*, pp. 38–39. If the provision objected to is determined to be invalid, then the judgment in the enforcement proceeding must be vacated and the proceeding dismissed. Section 204 (e) (2), *infra*, pp. 39–41.

The history of Section 204 (e) is briefly as follows: After the *Yakus* decision was handed down the question remained as to whether a determination by the Emergency Court of Appeals, or by this Court, that a regulation or order was invalid, would be a legal defense to an enforcement proceeding brought for a violation which had occurred prior to the determination of invalidity. Although the dissent of Mr. Justice Rutledge in the *Yakus* case took particular note of this question,[3] the majority opinion written by Mr. Chief

[3] Mr. Justice Rutledge said: "The very question, posed in the Court's own terms, is whether, if they had followed it, the remedy would be adequate constitutionally. It cannot be, under previously accepted ideas, if for one who follows it to a favorable judgment the penalty yet may fall. That question the Court does not decide" (321 U. S. at p. 477).

Justice Stone made no commitment with respect to it.*

This problem, however, was stressed in the course of Congressional consideration of the Stabilization Extension Act of 1944. The argument was made that under the existing law, it was possible for a defendant, who had failed to file his protest within sixty days, to pay statutory damages or to be convicted, sentenced to jail, and forced to serve a sentence for violating a regulation which the Emergency Court of Appeals might well declare to be invalid. It was also urged that even though exclusive jurisdiction to determine the validity of a regulation or order might be left with the Emergency Court of Appeals, that adequate provision should be made under certain circumstances for a stay of criminal proceedings to enable an innocent defendant to file a late protest against the validity of the regulation which an indictment charged that he violated.

In deference to this view, the Senate Banking and Currency Committee proposed an amendment

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*Chief Justice Stone said: "We have no occasion to decide whether one charged with criminal violations of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face. Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure, may thus be deprived of the defense that the regulation is invalid" (321 U. S. at pp. 446–447).

which would permit a defendant in a criminal proceeding to obtain leave, upon good cause shown, to file a complaint in the Emergency Court of Appeals attacking the validity of the regulation or order which he was charged with violating (Sen. Rep. No. 922, 78th Cong., 2d Sess., p. 12). As finally enacted, this amendment (Sec. 204 (e)) was broadened to apply to civil as well as to criminal proceedings. It was also specifically provided that a final judicial determination of the invalidity of a regulation would be a legal defense to enforcement proceedings for prior violation of that regulation. At the same time, the direct road to judicial review in the Emergency Court of Appeals was made more accessible by eliminating the original sixty-day time limit on the filing of protests. Provision was also made for stay of enforcement actions pending disposition of proceedings involving tests of the applicable regulations or orders. Section 204 (e) (2), *infra*, pp. 39–41. Thus, judicial review for the purpose of securing retrospective relief with respect to previous violations was explicitly embraced within the terms of the statute and the question left open by the *Yakus* decision became academic. See *United States* v. *George F. Fish, Inc.*, 154 F. 2d 798 (C. C. A. 2), certiorari denied, 328 U. S. 869.

However, in order to prevent the purposes of the amendment from being thwarted by violators seeking only to postpone the day of judgment,

the Congress imposed upon a defendant, as a condition for successfully invoking Section 204 (e), the burden of showing the good faith of his objection to the validity of the regulation or order and substantial excuse for his failure in the first instance to file a protest with the Administrator pursuant to Section 203.[5] The purpose of these conditions is well described by the Sixth Circuit

[5] The reasons for enacting this section were stated by Senator Wagner, Chairman of the Senate Banking and Currency Committee, and Manager of the Senate Conferees on the renewal of the Act, who presented the Conference Report to the Senate as follows: "The Price Administrator has expressed great concern lest the right accorded by this procedure be abused by defendants resorting to protests and leaves to complain, as a means of deferring or even avoiding the trial of criminal cases and of staying the execution of judgment in civil proceedings. But the procedure provided in the amendment does not represent a regular method to be followed in enforcement cases. Rather, it is an exceptional procedure which has been made available to avoid the risk of injustice that existed under the original act under which a defendant who had excusably failed to file a protest within the strict time limits the act allowed, might be denied any opportunity to question the validity of the regulation which he was charged with violating. The remedial procedure prescribed by the conference committee is available only to defendants whose objections the courts find have been made in good faith, and not primarily for the purpose of delay. The committee is confident that the courts will be vigilant in administering the standard of good faith to deny stays to defendants who have not previously availed themselves of the unrestricted opportunity to protest but who have been violating regulations on the gamble that, if caught, they could then protest and secure stays of proceedings which would afford them a good chance to avoid trial or the execution of judgment" (90 Cong. Rec., p. 6368).

in the case of *Dowling Brothers Distilling Company* v. *United States*, 153 F. 2d 353, 357 (C. C. A. 6), certiorari denied sub nom. *Gould, et al.* v. *United States*, 328 U. S. 848:

> * * * consideration must be given to the connotation of the terms "good faith" and "reasonable and substantial excuse," as they are used in section 204 (e) (1). This section was added in the June 30, 1944, renewal of the Act to aid persons who sincerely sought to pursue the exclusive statutory remedies but who might lack the opportunity to do so before being convicted and punished for violation. Prior to that time violations could be punished without regard to ultimate adjudications of invalidity in respect to the regulations. This was deemed necessary to prevent premature disruptions of war-time price controls. Section 204 (e) (1) made possible the testing of the validity of a price regulation after indictment and before trial. It is clear, however, that in setting up this procedure Congress did not intend to permit its use in every case as a matter of right. It therefore required a showing of good faith and a reasonable and substantial excuse for failure to protest, * * *.

Not only the authorities construing the provisions of Section 204 (e), but likewise the legislative history behind Section 204 (e), conclusively establish that the extraordinary procedure authorized by that section was intended by Congress

to be used most sparingly and only in exceptional cases. *McRae* v. *Creedon,* 162 F. 2d 989, 993 (C. C. A. 10); *Bowles* v. *Luster,* 153 F. 2d 382, 383 (C. C. A. 9); *United States* v. *Steiner,* 152 F. 2d 484 (C. C. A. 7), certiorari denied, 327 U. S. 789; *Dowling Brothers Distilling Company* v. *United States,* 153 F. 2d 353, 357 (C. C. A. 6), certiorari denied sub nom. *Gould, et al* v. *United States,* 328 U. S. 848; *United States* v. *Mayfair Meat Packing Corporation,* 158 F. 2d 685 (C. C. A. 2), certiorari denied, 331 U. S. 805; *United States* v. *Aronin,* 57 F. Supp. 186 (S. D. N. Y.); *United States* v. *Center Veal and Beef Company,* 61 F. Supp. 65, 72 (S. D. N. Y.); *United States* v. *Capitol Meats,* 66 F. Supp. 475 (E. D. N. Y.); Senate Report No. 922, 78th Cong., 2d Sess. p. 12; House Report No. 1698, 78th Cong., 2d Sess.

These provisions of Section 204 (e) do not make the granting of an application "merely a matter of judicial whim." *United States* v. *Steiner,* 152 F. 2d at p. 488. The procedure was intended to be used "in extraordinary circumstances in order to effectuate the purposes of the Act, without denial of fundamental justice." *McRae* v. *Creedon,* 162 F. 2d at p. 993. Section 204 (e) (1), *infra,* pp. 39–40, was added to the Act in 1944 "to aid persons who sincerely sought to pursue the exclusive statutory remedies but who might lack the opportunity to do so before being * * * punished for violation." *Dowling*

Brothers Distilling Company v. *United States*, 153 F. 2d at p. 357. If the application is to be granted, it "must have more to recommend it than the natural desire of every wrongdoer to postpone legal reckoning * * *." *United States* v. *Aronin*, 57 F. Supp. at p. 192.

Applying these tests to the facts contained in the certificate in the instant case, it is obvious that the defendant has not met the conditions of Section 204 (e) (1) of the Act. The certificate does not reveal that the defendant ever instituted protest proceedings with the Administrator pursuant to Sections 203 and 204 (a) to (d), or that he offered a satisfactory explanation for his failure to establish his right to go to the Emergency Court by following the administrative procedure provided for that purpose.* *A fortiori*, he has no

* Revised Procedural Regulation 3 (12 F. R. 1143), issued pursuant to Section 203 (a) of the Act, sets out the procedure by which landlords may file application for adjustment or other relief, Section 1300.202, *infra*, p. 43. Provision is made for the filing of the application in the first instance with the Area Rent Director. Section 1300.203, *infra*, p. 44. If the application for adjustment is denied, the defendant may petition the Regional Administrator to review the ruling of the Area Rent Director. Section 1300.214, *infra*, p. 44. An order entered by a Regional Administrator upon an application for review shall be binding until changed by further order and "shall be final subject only to protest as provided in Section 1300.221." See 1300.215, *infra*, p. 45. Hence, if the Regional Administrator affirms an order entered by the Area Rent Director reducing rent, the landlord's next step is to file a protest with the Administrator pursuant to Section 1300.221, *supra*, p. 47. While the

legal right to obtain permission from the District Court to proceed in the Emergency Court of Appeals until he has established the factual basis entitling him to that privilege as required by Section 204 (e) (1).

We submit that it is too plain to require extended argument that neither the trial court nor the court below can, on the facts contained in the certificate, determine that the defendant has sustained the burden of showing that his objection to the validity of the order involved here is made in good faith and that there is such reasonable and substantial excuse for his failure to present his objection in a protest filed pursuant to Section 203 (a) as to entitle him to file a complaint with the Emergency Court of Appeals pursuant to Section 204 (e). Consequently, an order

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Act provides no specific time for filing a protest against an order issued under Section 1300.215, the Regulation provides that if the protest is not filed within ninety days after the issuance of the order, the delay will be regarded as unreasonable and will result in dismissal of the protest unless special circumstances are shown to justify the delay. Section 1300.222, *infra*, pp. 47–48. Ordinarily, the filing of a protest is a prerequisite to obtaining judicial review by the Emergency Court of Appeals of the validity of a rent regulation or order. The other method available to obtain judicial review, discussed more fully above, is the filing of a complaint in the Emergency Court of Appeals after obtaining special leave to do so in an enforcement proceeding pursuant to Section 204 (e) of the Act. Section 1300.220, *infra*, p. 45. If the Administrator denies the protest in whole or in part, the landlord may then file a complaint in the Emergency Court of Appeals pursuant to Section 204 (a) of the Act. Section 1300.251, *infra*, p. 48.

by the court below, based only on the facts contained in the certificate, directing the District Court to grant the defendant permission to proceed in the Emergency Court of Appeals could be nothing less than arbitrary, and would amount to an unwarranted encroachment upon the judicial discretion vested in the District Court by Section 204 (e). Moreover, it is difficult to say that such action by the court below would be within its appellate powers, since it is not clear that the solution of the question concerning the defendant's right to proceed in the Emergency Court of Appeals is necessary to a decision on the appeal now pending before it in this case. Particularly, is such action questionable here where the defendant cannot apply to the district court for permission to proceed in the Emergency Court until after a judgment has been entered against him on the remand.

Accordingly, the court below should not direct the district court to grant the defendant leave pursuant to Section 204 (e) of the Act to file a complaint in the Emergency Court of Appeals, and the entire third question should be answered in the negative.

CONCLUSION

It is respectfully submitted that the first question certified should be answered in the negative; that the second question certified should be answered in the affirmative; and that the third

question certified, if it be considered as properly certified, should be answered in the negative.

Respectfully submitted.

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DECEMBER 1947.

APPENDIX

Statute and Regulations Involved

1. *Emergency Price Control Act of 1942*, as amended (56 Stat. 23, 765, 58 Stat. 632, 59 Stat. 306, 60 Stat. 664, 50 U. S. C. App., Secs. 901 et seq.)

Section 1 (b): "The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on *June 30, 1947*,[1] or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier; except that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution

[1] Originally "June 30, 1943." On October 2, 1942, amended to read "June 30, 1944" (Sec. 7 (a) of Stabilization Act of 1942, 56 Stat. 767). On June 30, 1944, amended to read "June 30, 1945" (sec. 101 of Stabilization Extension Act of 1944, 58 Stat. 632). On June 30, 1945, amended to read "June 30, 1946" 59 Stat. 306. On July 25, 1946, amended to read "June 30, 1947" (sec. 1 of the Price Control Extension Act of 1946, 60 Stat. 664).

with respect to any such right, liability, or offense."

SEC. 2 (b): "Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he shall issue a declaration setting forth the necessity for, and recommendations with reference to, the stabilization or reduction of rents for any defense-area housing accommodations within a particular defense-rental area. If within sixty days after the issuance of any such recommendations rents for any such accommodations within such defense-rental area have not in the judgment of the Administrator been stabilized or reduced by State or local regulation, or otherwise, in accordance with the recommendations, the Administrator may by regulation or order establish such maximum rent or maximum rents for such accommodations as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum rent for any defense-area housing accommodations, the Administrator shall ascertain and give due consideration to the rents prevailing for such accommodations, or comparable accommodations, on or about April 1, 1941 (or if, prior or subsequent to April 1, 1941, defense activities shall have resulted or threatened to result in increases in rents for housing accommodations in such area inconsistent with the purposes of this Act, then on or about a date (not earlier than April 1, 1940), which in the judgment of the Administrator, does not reflect such increases), and he shall make adjustments for such relevant factors as he may determine and deem

to be of general applicability in respect of such accommodations, including increases or decreases in property taxes and other costs within such defense-rental area. In designating defense-rental areas, in prescribing regulations and orders establishing maximum rents for such accommodations, and in selecting persons to administer such regulations and orders, the Administrator shall, to such extent as he determines to be practicable, consider any recommendations which may be made by State and local officials concerned with housing or rental conditions in any defense-rental area. * * *"

SEC. 2 (c): "Any regulation or order under this section may be established in such form and manner, may contain such classifications and differentiations, and may provide for such adjustments and reasonable exceptions, as in the judgment of the Administrator are necessary or proper in order to effectuate the purposes of this Act. Under regulations to be prescribed by the Administrator, he shall provide for the making of individual adjustments in those classes of cases where the rent on the maximum rent date for any housing accommodations is, due to peculiar circumstances, substantially higher or lower than the rents generally prevailing in the defense-rental area for comparable housing accommodations, and in those classes of cases where substantial hardship has resulted since the maximum rent date from a substantial and unavoidable increase in property taxes or operating costs. Any regulation or order under this section which establishes a maximum price or maximum rent may provide for a maximum price or maximum

rent below the price or prices prevailing for the commodity or commodities, or below the rent or rents prevailing for the defense-area housing accommodations, at the time of the issuance of such regulation or order."

SEC. 4 (a): "It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under section 2, or of any price schedule effective in accordance with the provisions of section 206, or of any regulation, order, or requirement under section 202 (b) or section 205 (f), or to offer, solicit, attempt, or agree to do any of the foregoing."

SEC. 203: "(a) At any time after the issuance of any regulation or order under section 2, or in the case of a price schedule, at any time after the effective date thereof specified in section 206, any person subject to any provision of such regulation, order, or price schedule may, in accordance with regulations to be prescribed by the Administrator, file a protest specifically setting forth objections to any such provision and affidavits or other written evidence in support of such objections. Statements in support of any such regulation, order, or price schedule may be received and incorporated in the transcript of the proceedings at such times and in accordance with such regulations as may be prescribed by the Ad-

ministrator. Within a reasonable time after the filing of any protest under this subsection, but in no event more than thirty days after such filing, the Administrator shall either grant or deny such protest in whole or in part, notice such protest for hearing, or provide an opportunity to present further evidence in connection therewith. In the event that the Administrator denies any such protest in whole or in part, he shall inform the protestant of the grounds upon which such decision is based, and of any economic data and other facts of which the Administrator has taken official notice.

* * * * *

"(c) Any proceedings under this section may be limited by the Administrator to the filing of affidavits, or other written evidence, and the filing of briefs: Provided, however, That, upon the request of the protestant, any protest filed in accordance with subsection (a) of this section after September 1, 1944, shall, before denial in whole or in part be considered by a board of review consisting of one or more officers or employees of the Office of Price Administration designated by the Administrator in accordance with regulations to be promulgated by him. Such regulations shall provide that the board of review may conduct hearings and hold sessions in the District of Columbia or any other place, as a board, or by subcommittees thereof, and shall provide that, upon the request of the protestants and upon a showing that material facts would be adduced thereby, subpenas shall issue to procure the evidence of persons, or the production of documents, or both. The Administrator shall

cause to be presented to the board such evidence, including economic data, in the form of affidavits or otherwise, as he deems appropriate in support of the provision against which the protest is filed. The protestant shall be accorded an opportunity to present rebuttal evidence in writing and oral argument before the board and the board shall make written recommendations to the Price Administrator. The protestant shall be informed of the recommendations of the board and, in the event that the Administrator rejects such recommendations in whole or in part, shall be informed of the reasons for such rejection.

"(d) Any protest filed under this section shall be granted or denied by the Administrator, or granted in part and the remainder of it denied, within a reasonable time after it is filed. Any protestant who is aggrieved by undue delay on the part of the Administrator in disposing of his protest may petition the Emergency Court of Appeals, created pursuant to section 204, for relief; and such court shall have jurisdiction by appropriate order to require the Administrator to dispose of such protest within such time as may be fixed by the court. If the Administrator does not act finally within the time fixed by the court, the protest shall be deemed to be denied at the expiration of that period."

SEC. 204: "(a) Any person who is aggrieved by the denial or partial denial of his protest may, within thirty days after such denial, file a complaint with the Emergency Court of Appeals, created pursuant to subsection (c), specifying his objections and praying that the regulation,

order, or price schedule protested be enjoined or set aside in whole or in part. A copy of such complaint shall forthwith be served on the Administrator, who shall certify and file with such court a transcript of such portions of the proceedings in connection with the protest as are material under the complaint. Such transcript shall include a statement setting forth, so far as practicable, the economic data and other facts of which the Administrator has taken official notice. Upon the filing of such complaint the court shall have exclusive jurisdiction to set aside such regulation, order, or price schedule, in whole or in part, to dismiss the complaint, or to remand the proceeding: *Provided,* That the regulation, order, or price schedule may be modified or rescinded by the Administrator at any time notwithstanding the pendency of such complaint. No objection to such regulation, order, or price schedule, and no evidence in support of any objection thereto, shall be considered by the court, unless such objection shall have been set forth by the complainant in the protest or such evidence shall be contained in the transcript. If application is made to the court by either party for leave to introduce additional evidence which was either offered to the Administrator and not admitted, or which could not reasonably have been offered to the Administrator or included by the Administrator in such proceedings, and the court determines that such evidence should be admitted, the court shall order the evidence to be presented to the Administrator. The Administrator shall promptly receive the same, and

such other evidence as he deems necessary or proper, and thereupon he shall certify and file with the court a transcript thereof and any modification made in the regulation, order, or price schedule as a result thereof; except that on request by the Administrator, any such evidence shall be presented directly to the court.

"(b) No such regulation, order, or price schedule shall be enjoined or set aside, in whole or in part, unless the complainant establishes to the satisfaction of the court that the regulation, order, or price schedule is not in accordance with law, or is arbitrary or capricious. The effectiveness of a judgment of the court enjoining or setting aside, in whole or in part any such regulation, order, or price schedule shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (d) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the case by the Supreme Court.

"(c) There is hereby created a court of the United States to be known as the Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Emergency Court of Appeals, and may, from time to time, designate additional judges for such

court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Two judges shall constitute a quorum of the court and of each division thereof. The court shall have the powers of a district court with respect to the jurisdiction conferred on it by this Act; except that the court shall not have power to issue any temporary restraining order or interlocutory decree staying or restraining, in whole or in part, the effectiveness of any regulation or order issued under section 2 or any price schedule effective in accordance with the provisions of section 206. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases of which it has jurisdiction under this Act. The court may fix and establish a table of costs and fees to be approved by the Supreme Court of the United States, but the costs and fees so fixed shall not exceed with respect to any item the costs and fees charged in the Supreme Court of the United States. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(d) Within thirty days after entry of a judgment or order, interlocutory or final, by the Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme

Court in the same manner as a judgment of a circuit court of appeals as provided in section 240 of the Judicial Code, as amended (U. S. C., 1934 edition, title 28, sec. 347). The Supreme Court shall advance on the docket and expedite the disposition of all causes filed therein pursuant to this subsection. The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision.

"(e) (1) Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 *of this Act or section 37 of the Criminal Code,*[2] involving alleged violation of

[2] Added by sec. 6 of the Act of June 30, 1945, 59 Stat. 308.

any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated *or conspired to violate.*[2] The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a). Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint. The court may authorize the introduction of evidence, either to the Administrator or directly to the court, in accordance with subsection (a) of this section. The provisions of subsections (b), (c), and (d) of this section shall be applicable with respect to any proceeding instituted in accordance with this subsection.

(2) In any proceeding brought pursuant to section 205 *of this Act or section 37 of the Criminal Code,*[2] involving an alleged violation of any provision of any such regulation, order or price schedule, the court shall stay the proceeding—

[2] Added by sec. 6 of the Act of June 30, 1945, 59 Stat. 308.

(i) during the period within which a complaint may be filed in the Emergency Court of Appeals pursuant to leave granted under paragraph (1) of this subsection with respect to such provision;

(ii) during the pendency of any protest properly filed by the defendant under section 203 prior to the institution of the proceeding under section 205 *of this Act or section 37 of the Criminal Code,*[2] setting forth objections to the validity of such provision which the court finds to have been made in good faith; and

(iii) during the pendency of any judicial proceeding instituted by the defendant under this section with respect to such protest or instituted by the defendant under paragraph (1) of this subsection with respect to such provision, and until the expiration of the time allowed in this section for the taking of further proceedings with respect thereto.

Notwithstanding the provisions of this paragraph, stays shall be granted thereunder in civil proceedings only after judgment and upon application made within five days after judgment. Notwithstanding the provisions of this paragraph, in the case of a proceeding under section 205 (a) the court granting a stay under this paragraph shall issue a temporary injunction or restraining order enjoining or restraining, during the period of the stay, violations by the defendant of any provision of the regulation, order, or price schedule involved in the proceeding. If any provision of a regulation, order, or price schedule is determined to be invalid by judgment of the Emergency Court of Appeals which has become effective in accordance

[2] Added by sec. 6 of the Act of June 30, 1945, 59 Stat. 308.

with section 204 (b), any proceeding pending in any court shall be dismissed, and any judgment in such proceeding vacated, to the extent that such proceeding or judgment is based upon violation of such provision. Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 *of this Act or section 37 of the Criminal Code;*[1] nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206.

2. *Rent Regulation for Housing* (8 F. R. 7322, 14663)

SEC. 1. "Scope of this regulation—(a) Housing and defense-rental areas to which this regulation applies.—This regulation applies to all housing accommodations within each of the defense rental areas and each of the portions of a defense-rental area (each of which is referred to hereinafter in this regulation as the 'defense-rental area'), which are listed in Schedule A of this regulation, except as provided in paragraph (b) of this section."

SEC. 2. "Prohibition against higher than maximum rents—(a) General prohibition.—Regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, no person shall demand or receive any rent for use

[1] Added by sec. 6 of the Act of June 30, 1945, 59 Stat. 308.

or occupancy on and after the effective date of regulation of any housing accommodations within the Defense-Rental Area higher than the maximum rents provided by this regulation; and no person shall offer, solicit, attempt, or agree to do any of the foregoing. Lower rents than those provided by this regulation may be demanded or received."

SEC. 4. "Maximum rents. Maximum rents (unless and until changed by the Administrator as provided in section 5) shall be:

"(a) *Rented on maximum rent date.*—For housing accommodations rented on the maximum rent date, the rent for such accommodations on that date.

* * * * * *

"(e) *First rent after effective dat.* —For (1) newly constructed housing accommodations without priority rating first rented on or after the effective date of regulation, or (2) housing accommodations changed on or after such effective date so as to result in an increase or decrease of the number of dwelling units in such housing accommodations, or (3) housing accommodations not rented at any time during the two months ending on the maximum rent date nor between that date and the effective date, the first rent for such accommodations after the change or the effective date, as the case may be, but in no event more than the maximum rent provided for such accommodations by any order of the Administrator issued prior to September 22, 1942. Within 30 days after so renting the landlord shall register the accommodations as provided in section

7. The Administrator may order a decrease in the maximum rent as provided in section 5 (c).

SEC. 5. "Adjustments and other determinations. In the circumstances enumerated in this section the Administrator may issue an order changing the maximum rents otherwise allowable or the minimum services required. * * *

* * * * * * * * *

"(c) *Grounds for decrease of maximum rent.*—The Administrator at any time, on his own initiative or on application of the tenant, may order a decrease of the maximum rent otherwise allowable, only on the grounds that:

"(1) *Rent higher than rents generally prevailing.*—The maximum rent for housing accommodations under paragraphs (c), (d), (e), (g), or (j) of section 4 is higher than the rent generally prevailing in the Defense-Rental Area for comparable housing accommodations on the maximum on rent date."

REV. PROCEDURAL REG. 3

[As Amended]

[12 F. R. 1143]

SUBPART A—LANDLORDS' PETITIONS; AND TENANTS' APPLICATIONS

§ 1300.202 *Right to file petition.*—A petition for adjustment or other relief may be filed by any landlord subject to any provision of a maximum rent regulation who requests such adjustment or relief pursuant to a provision of the maximum rent regulation authorizing such action.

§ 1300.203 *Method of filing, form, and contents.*—A petition for adjustment or other relief provided for by a maximum rent regulation shall be filed with the rent director of the Office of Price Administration, Office of Temporary Controls, for the defense-rental area within which the housing accommodations involved are located. Petitions shall be filed upon forms prescribed by the Administrator and pursuant to instructions stated on such forms and may be accompanied by affidavits or other documents setting forth the evidence upon which the petitioner relies in support of the facts alleged in his petition.

§ 1300.214 *Landlords' applications for review in cases not concerning certificates relating to eviction.*—(a) Any landlord whose petition for adjustment or other relief, except a petition for a certificate relating to eviction, has been dismissed or denied in whole or in part by the rent director, or any landlord subject to an order entered by the rent director on his own initiative may file with the rent director an application for review of such determination by the Regional Administrator for the region in which the defense-rental area office is located: *Provided,* That any landlord subject to an order entered under section 5 (d) of any maximum rent regulation or subject to an order entered by the rent director under § 1300.207 of this regulation, may either apply for review of such order as provided in this section, or may protest any provision of such order as provided in §§ 1300.221, and following, of this regulation. An application for review shall be filed in triplicate upon forms prescribed by the Administrator and pursuant to instructions stated on such forms.

Upon the filing of an application for review of such determination, the rent director shall forward the record of the proceedings, with respect to which such application is filed, to the appropriate Regional Administrator.

(b) Applications for review may be filed within ninety (90) days after the date of issuance of the determination to be reviewed. An application for review which is not filed within the specified time ordinarily will be dismissed unless special circumstances are shown to justify a later filing.

§ 1300.215 *Action on applications for review.*—Upon the filing of an application for review in accordance with § 1300.214 of this regulation, and after due consideration, the Regional Administrator may affirm, revoke, or modify, in whole or in part, the determination of the rent director sought to be reviewed and may enter such order as is necessary or proper. In any case where an application for review does not conform in a substantial respect to the requirements of this regulation, the Regional Administrator may dismiss such application. An order entered by a Regional Administrator upon an application for review shall be effective and binding until changed by further order and shall be final subject only to protest as provided in § 1300.221, and following, of this regulation. An order entered by a Regional Administrator upon an application for review may be revoked or modified at any time upon due notice to the applicant.

* * * * * * *

§ 1300.220 *Action by the Administrator on*

petition.—In the consideration of any petition for amendment, the Administrator may afford to the petitioner and to other persons likely to have information bearing upon such proposed amendment, or likely to be affected thereby, an opportunity to present evidence or argument in support of, or in opposition to, such proposed amendment. Whenever necessary or appropriate for the full and expeditious determination of common questions raised by two or more petitions for amendment, the Administrator may consolidate such petitions.

SUBPART C—PROTESTS

Introduction.—Subpart C deals with protests. A protest is the means provided by Section 203 (a) of the Act for landlords to make formal objections to a maximum rent regulation or order, and for both landlords and tenants to make formal objections to individual orders involving certificates relating to eviction. Neither landlord nor tenant may file a protest in a case involving a certificate relating to eviction unless an application for review of the order pertaining to such certificate has been determined in whole or in part adversely to such party by the Regional Administrator pursuant to §§ 1300.209 to 1300.212, inclusive, of this regulation. Ordinarily, the filing of a protest is also a prerequisite to obtaining judicial review by the Emergency Court of Appeals of the validity of a rent regulation or order. The other method available to landlords, only, to obtain judicial review is the filing of a

complaint in the Emergency Court of Appeals after obtaining special leave to do so in an enforcement proceeding pursuant to section 204 (e) of the act.

* * * * * * *

§ 1300.221 *Right to protest.*—(a) Any tenant or landlord subject to an order issued under § 1300.212 of this regulation may file a protest in the manner set forth below. An order issued by a Regional Administrator under § 1300.210 of Revised Procedural Regulation No. 3 (now § 1300.215 of this regulation) upon a landlord's application for review in a case involving a certificate relating to eviction shall, for the purposes of this regulation, be deemed an order issued pursuant to § 1300.212 of this regulation.

(b) Any landlord subject to any provision of a maximum rent regulation, or of an order issued under § 1300.215 of this regulation, or of an order entered under section 5 (d) of any maximum rent regulation, or of an order entered by the rent director under § 1300.207 of this regulation, may file a protest in the manner set forth below.

* * * * * * *

§ 1300.222 *Time and place of filing protests.*—(a) Any protest against the provisions of a maximum rent regulation may be filed at any time after the issuance thereof.

(b) The Act provides no specific time limit for filing a protest against an order issued under § 1300.212 or § 1300.215 of this regulation, or of an order entered under section 5 (d) of any maxi-

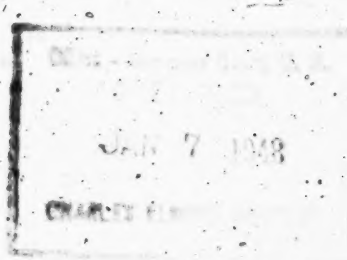
mum rent regulation, or of an order entered by the rent director under § 1300.207 of this regulation. However, as the United States Emergency Court of Appeals has stated in its opinion in the case of R. E. Schanzer, Inc., v. Bowles, 141 F. 2d 262 (1944), if the filing of a protest is unduly delayed, the defense of laches (unreasonable delay) may be available to the Administrator. There will ordinarily be no reason why a protest against an order of the kind specified in this paragraph, affecting only an individual, cannot be filed promptly after the issuance of such order. Accordingly, if a protest is not filed within ninety (90) days after the date of issuance of such order, (or before May 21, 1947 in the case of an order issued prior to February 20, 1947 pursuant to § 1300.212 of this regulation) the Administrator ordinarily will regard the delay as unreasonable and will dismiss the protest unless special circumstances are shown to justify the delay.

(c) Protests shall be filed with the Secretary of the Office of Price Administration, Office of Temporary Controls, Washington 25, D. C. A copy of the protest shall also be filed with the appropriate Regional Administrator or rent Director as provided in § 1300.226 of this regulation.

§ 1300.251 *Opinion denying protest in whole or in part.*—In the event that the Administrator denies any protest in whole or in part, the protestant, and the respondent, if any, shall be informed of any economic data or other facts of which he takes official notice, the grounds upon which such decision is based, and (if the protest

has been considered by a board of review) the recommendations of a board of review and, if any recommendation of such a board has been rejected, the reason for rejection. Any order entered in such protest proceedings shall be effective from the date of its issuance unless otherwise provided in such order, or in this regulation.

U. S. GOVERNMENT PRINTING OFFICE: 1947



No. 437

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1947

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

vs.

W. H. HILLS

BRIEF OF THE DEFENDANT

No. 437

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1947

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

vs.

W. H. HILLS

On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit

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There is no reason for us to repeat the Statement of Facts given in the Brief of the Administrator.

Neither do we question the quotations from the Laws and Regulations given by the Administrator in the Appendix of his Brief.

BRIEF ARGUMENT OF DEFENDANT

The OPA brought this action in the United States District Court for Kansas, thereby asking the court to take jurisdiction. A court must determine the issued involved in the action before it. It would have been proper for the complainant to have alleged and proved, as an ingredient of their action a proper and legal regulation or order which has been violated by the defendant. This was essential. The complainant did not furnish and prove such a facts so the lower court decided against him. The judgment was for the defendant.

The defendant had alleged and proved that a proper and legal order, made in every respect in conformity to

the general regulations promulgated by the OPA was in effect and the defendant lived up to this regulation. The court sustained his proof.

We contend that the court had a right to sustain the regular regulations of the OPA as against one that was in conflict thereto, and did not conform to, but was in express violation of the regular regulations. This the court did.

It was absolutely necessary for the district court to sustain some regulation or not render judgment.

Now if the district court did not have jurisdiction to determining what was a legal regulation, the United States Circuit Court of Appeals does not have that jurisdiction; and it follows that the Supreme Court of the United States does not have any jurisdiction of the subject unless it comes to the court from an appeal from the Emergency Court of Appeals. If the district court did not have the jurisdiction the jurisdiction is withdrawn from all of these courts.

ANSWERING THE QUESTIONS

(1) The district court sustained the regulations of the OPA, it did not try to question them. It has held the second rent order was a violation of the OPA regulations.

(2) It seems res judicata. It seems the district court should be commended for sustaining the regulations.

(3) The Circuit Court of Appeals would be under obligation to support the OPA regulations, and hence not to render judgment against Hills. The OPA Regulations were observed by Hills. He did not obey an order made contrary to the regulations, and in violation of the regulations. He did obey an order made in conformity to the regulations.

GEO. D. RATHBUN, Attorney for Defendant

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 437.

TIGHE E. WOODS, Housing Expediter,

—against—

W. H. HILLS.

PETITION FOR REHEARING.

HENRY N. RAPAPORT,
Counsel for Defendant,
No. 9 East 40th Street,
New York 16, N. Y.

Dated: New York, June 1, 1948.

THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 437.

TIGHE E. WOODS, Housing Expediter,

—against—

W. H. HILLS.

PETITION FOR REHEARING.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The defendant, W. H. Hills, respectfully presents this, his petition for rehearing in the above entitled cause, by his substituted attorney, Henry N. Rapaport, pursuant to Rule 33 of the Rules of this Court and in support thereof submits the following:

Statement of Grounds.

The grounds for such prayer are in the interests of justice and that the Court did not consider or pass upon a vital provision of statute, the necessary effect of which would be to require a change in the decision and opinion of the Court.

The cause was presented to the Court upon briefs of counsel, and upon oral argument. Nowhere in his

erudite and extended brief filed December 23, 1947 did the Solicitor General make reference to the crucial amendment of Section 204 (e), Emergency Price Control Act,[1] upon which the decision is based, although the statute as amended is purportedly quoted at length (Appendix, pp. 29-41). The Emergency Court of Appeals over a period of nine months after the amendment had been acquiring jurisdiction of rent cases under Section 204 (e); and that learned Court had been passing upon the validity of the Price Administrator's Rent Regulations on appeal by the so-called alternative route, without objection by the Office of Housing Expediter. Counsel is informed that the reference to the July 30, 1947 amendment was first made by the Government in oral argument. Obviously, the Government was not aware of it substantially before.

It is equally obvious, from defendant's original brief and the facts, that his counsel *pro hac vice* was hampered in his presentation by a lack of familiarity with the statute and regulations in meeting this unexpected new point. The Court did not, therefore, have presented before it that complete and studied analysis of the statute to which it is accustomed and which it normally receives.

On the Merits.

The Court's determination that with the Appropriation Act Amendment there abated the authority of the Emergency Court of Appeals to acquire jurisdiction under Section 204 (e) of the Emergency Price

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[1] Supplemental Appropriation Act, 1948, approved July 30, 1947, 12 F. R. 2645.

Control Act rests upon the uncontrovertible and literal interpretation of the statute.

The same standard of statutory construction leads inevitably to the conclusion that Congress thereby created a "meaningless anomaly" of Section 204 (d) so far as it applies to this defendant and others in like position.

If, in fact, the relegation of a defendant to the direct Protest route to test the validity of a rent order or regulation were to leave him adequate opportunity for due process via a Court proceeding, there could be no Constitutional objection. If, in fact, a defendant in a rent enforcement case has as much due process protection as was present at the time of the *Yakus* and *Willingham* cases,[2] then he must pursue his administrative appeal.

The majority opinion in the *Yakus* case stated:

> "We have no occasion to decide whether one charged with criminal violations of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face. Nor do we consider whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure, may thus be deprived of the defense that the regulation is invalid" (321 U. S. at pp. 446-447).

Mr. Justice Rutledge, dissenting, said:

> "The very question, posed in the Court's own

[2] *Yakus v. U. S.*, 321 U. S. 414; *Bowles* v. *Willingham*, 321 U. S. 503.

term, is whether, if they had followed it, the remedy would be adequate constitutionally. It cannot be, under previously accepted ideas, if for one who follows it to a favorable judgment the penalty yet may fall. That question the Court does not decide". (321 U. S. at p. 477).

After the *Yakus* and *Willingham* cases were decided, the Congress, taking note of this Court's significant intimation, and to avoid any possibility of constitutional interdiction, added sub-section (e) to Section 204.[3]

As Judge Lindley said in *Thomas Paper Stock Company* v. *Bowles*, 148 Fed. (2d) 831:

"Thus in the Senate Senator Danaher, after directing that body's attention to the fact that in the then recent opinion of *Yakus* v. *United States*, 321 U. S. 414, the Supreme Court had remarked that it had 'no occasion to decide whether one charged with criminal violation of a duly promulgated price regulation may defend on the ground that the regulation is unconstitutional on its face' and that it did not determine 'whether one who is forced to trial and convicted of violation of a regulation, while diligently seeking determination of its validity by the statutory procedure, may thus be deprived of the defense that the regulation is invalid,' said: 'In what we have done we have perfected the two points as to which the Supreme Court has entered no decision, to the end that there can be no question of the denial of or the existence of due process.'"

[3] Stabilization Act of 1944, Section 107 (b).

Subsection (e) did more than add an alternative method of testing the validity of an Office of Price Administration regulation or order. It created an exclusive method, which had not theretofore existed.

Prior to the Stabilization Act of 1944, a judgment of the Emergency Court of Appeals invalidating a Price Administrator's order made under Section 204 (a) (after Protest) could be effective to procure the setting aside of a criminal conviction or civil judgment based on such invalid order. That seems clearly to have been the basis of this Court's decisions in the *Yakus* and *Willingham* cases. After Section 204 (e) was added, and amended by Section 6 of Public Law 108, 79th Congress, First Session, 1945, 59 Stat. 308, there could be retroactive effect only if the judgment of the Emergency Court of Appeals complied with Section 204 (e) (2) (iii).[4]

The subsection refers to only two types of cases:

1. Where the Protest was filed before the enforcement action was commenced.
2. Where no Protest was filed; or one was filed after the commencement of the enforcement action, but the objection to the validity of the regulation or order is made in good faith and there is reasonable and substantial excuse for the defendant's failure to present such objection in a Protest filed in accordance with Section 203 (a).

[4] "Except as provided in this subsection, the pendency of any protest under section 203, or judicial proceeding under this section, shall not be grounds for staying any proceeding brought pursuant to section 205 of this Act or section 37 of the Criminal Code; nor, except as provided in this subsection, shall any retroactive effect be given to any judgment setting aside a provision of a regulation or order issued under section 2 or of a price schedule effective in accordance with the provisions of section 206."

In either case, the action must be stayed (in civil cases, only after judgment) until the determination of the Emergency Court of Appeals. It is truly an ancillary proceeding as to the issue of the validity of the rent order or regulation.

150 East 47th Street Corp. v. *Porter,* 156 Fed. (2d) 541.

But the determination of that issue by some Court of competent jurisdiction, and the right to adequate relief on a favorable decision are the very essence of due process. That is what is now denied.

Since the Congress has now eliminated the second method—leaving unchanged the restriction against retroactive relief—the necessary result is that defendants in rent enforcement actions have no right to an effective day in Court. This is so, even though they may have duly, timely and meticulously followed the statute and Price Administrator's Procedural Regulation in seeking administrative review and even though they are ultimately successful in having the Emergency Court of Appeals declare the rent order or regulation invalid. This follows from the fortuitous circumstance that the enforcement action was commenced first. So, in the instant case, if the present decision stands, it would be futile for defendant to file a Protest. For the trial in the District Court will proceed and he must suffer judgment against him without possibility of stay under the statute. A later decision by the Emergency Court of Appeals can have no effect on that judgment—by the specific provisions of Section 204 (e) (2) (iii).

Since this Court's opinion affects other meritorious cases, they should be considered. On July 26, 1946, a Rent Director issued an order fixing rent on a

summer seasonal apartment. The order purported to be retroactive three years. The owner, claiming to be exempt under the regulation and that the order was invalid and beyond the power of the Rent Director, duly and timely filed a Petition for Review by the Regional Administrator in accordance with Revised Procedural Regulation #3, Section 1300.209[5] issued by the Price Administrator. The owner did not then protest the regulation involved because other owners had done that (with no final decision from the Emergency Court of Appeals yet). When the Regional Administrator affirmed the order, the owner duly and timely filed a Protest in accordance with Section 1300.221 of the amended Revised Procedural Regulation #3. This procedural regulation, it will be noted, was issued pursuant to Sections 201(d) and 203(a) of the Emergency Price Control Act.[6]

But in the meantime the tenant had commenced action in a state court, and that enforcement court, in November, 1947 (five months after the filing of the Protest), rendered judgment against the owner for treble damages, counsel fees and costs, including the rental paid prior to July 26, 1946. This included the period July 1st to 25th during which, as the Housing Expediter's brief notes (fn. 2, p. 13), "The Emergency Price Control Act of 1942 . . . . and the regulations and orders issued thereunder were not currently in effect." It also included a period prior to the issuance of the order as to which the agency now concedes the order could not be effective.

Cf. *Markbreiter* v. *Woods*, 163 Fed. (2nd) 993.

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[5] Subsequently, as amended February 19, 1947, this became Section 1300.214.

[6] See good discussion, fn. 6, brief of Solicitor General.

Leave to file a complaint in the Emergency Court of Appeals was granted under Section 204 (e), erroneously as now appears. The Housing Expediter moved to dismiss, *inter alia*, that the Court and the agency should not be compelled to pass twice on the same questions. The owner thereupon withdrew the Protest; and the motion to dismiss the complaint in the Emergency Court of Appeals was denied. Now, on the basis of this Court's decision, that complaint has been dismissed for want of jurisdiction.

Kibrick v. *Woods*, E. C. A. 460.

So it appears that an ultimately successful conclusion to this owner's Protest, even if permission to reinstate is granted, can have no purpose. For by the terms of the statute there can be no relief from the Emergency Court of Appeals that will affect the judgment.

* * * *

Thus, this rent order defendant has far less protection than he would have had at the time of the *Yakus* and *Willingham* cases. At that time he would have had an adequate and effective judicial hearing. Now, there is a total and absolute denial of due process, the necessary effect of which is to deprive Section 205 (e) (under which enforcement is sought), of constitutional support.

Modification Sought.

Question 1 is therefore academic. If answered at all, it ought to be in the affirmative—not because the District Court may pass on the validity of the Rent Director's order—but because Section 205 (e), being

now invalid as applied to this defendant, there is no cause of action.

In any event, if this answer be deemed improper because the certified question does not directly call for it, at least defendant and others in like position should not be precluded from raising the question of constitutionality by the statement in this Court's opinion.

CONCLUSION.

Wherefore, the defendant respectfully prays that this petition for a rehearing should be granted in the interests of justice.

Respectfully submitted,

W. H. HILLS,
Defendant,
By HENRY N. RAPAPORT,
Counsel for Defendant.

June 1, 1948.

Certificate of Counsel.

I, HENRY N. RAPAPORT, counsel for the defendant, the petitioner herein, do hereby certify that the foregoing petition and application is presented in good faith and not for delay.

HENRY N. RAPAPORT,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 437.—October Term, 1947.

Tighe E. Woods, Housing Expediter, Petitioner, v. W. H. Hills.	On Certificate from the United States Court of Appeals for the Tenth Circuit.

[May 10, 1948.]

Mr. Chief Justice Vinson delivered the opinion of the Court.

In this case, the Court of Appeals for the Tenth Circuit has certified questions of law concerning which it asks instructions for the proper decision of the cause pending in that court. Judicial Code, § 239; 28 U. S. C. § 346.

The certificate states that this is an action brought by the Administrator for treble damages and for an injunction under § 205 of the Emergency Price Control Act[1] and under the Rent Regulation for Housing.[2] Hills, the defendant below, remodeled apartments located in a Defense Rental Area, subject to the Rent Regulations, and duly registered them. Thereafter, on December 17, 1943, the maximum rents were reduced by the Area Rent Director pursuant to § 5 (c) of the Regulation; and on March 7, 1945, the Rent Director issued an order further reducing the maximum rents.

On trial in the District Court without a jury, the parties stipulated that the only issue was the validity of the second order. The District Court entered judgment for the defendant on October 29, 1946, holding that the burden was on the Administrator to establish the validity of the second order and that he had failed to introduce proof establishing its validity.

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[1] As amended, 50 U. S. C. A. App. §§ 901, 925.

[2] As amended, 8 F. R. 7322.

At the time the District Court entered its judgment, exclusive jurisdiction to pass on the validity of a regulation or order issued by the Administrator was vested in the Emergency Court of Appeals and in this Court upon review of judgments and orders of the Emergency Court. § 204 (d), 50 U. S. C. A. App. § 924 (d). However, the appeal by the Administrator from the judgment of the District Court was not submitted in the Circuit Court of Appeals until September 10, 1947, and the Emergency Price Control Act expired by its terms on June 30, 1947. § 1 (b), 50 U. S. C. A. App. § 901 (b).

The questions certified are as follows:

"(1) On remand, will the District Court of the United States for the District of Kansas, First Division, have jurisdiction to determine the validity of the second rent order and should we direct the District Court to pass on the validity of such rent order?

"(2) If the first question is answered in the negative, does the Emergency Court of Appeals still have jurisdiction to determine the validity of the second rent order?

"(3) If the second question is answered in the affirmative, and this court remands the cause with directions to enter judgment as prayed for against Hills, may Hills, under Sec. 204 (e) of the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App., Sec. 924 (e)), apply to the District Court for leave to file in the Emergency Court of Appeals a complaint against the Administrator, setting forth objections to the validity of the second rent order, and, upon proper petition and showing, obtain the relief provided for in Sec. 204 (e), and should we so direct on remand?"

There can be no doubt that the exclusive jurisdiction conferred on the Emergency Court of Appeals by

§ 204 (d)[3] precluded the District Court in 1946 from determining the validity of the individual rent order even though the defense to the action brought there was based on the alleged invalidity of the order.[4]

The Emergency Price Control Act was to terminate on June 30, 1947. Section 1 (b), which fixed that date, expressly provides that "as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense." Since the offense complained of in the case at bar occurred before the termination date, § 1 (b) would apply and the Emergency Court of Appeals would still have exclusive jurisdiction to pass on the validity of the second rent order, if additional prerequisites set forth in § 204 (e) (1) of the statute were satisfied.[5]

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[3] ". . . The Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Emergency Court of Appeals, shall have exclusive jurisdiction to determine the validity of any regulation or order issued under section 2, of any price schedule effective in accordance with the provisions of section 206, and of any provision of any such regulation, order, or price schedule. Except as provided in this section, no court, Federal, State, or Territorial, shall have jurisdiction or power to consider the validity of any such regulation, order, or price schedule, or to stay, restrain, enjoin, or set aside, in whole or in part, any provisions of this Act authorizing the issuance of such regulations or orders, or making effective any such price schedule, or any provision of any such regulation, order, or price schedule, or to restrain or enjoin the enforcement of any such provision."

[4] See *Bowles* v. *Willingham*, 321 U. S. 503, 510–511, 521 (1944); *Yakus* v. *United States*, 321 U. S. 414 (1944).

[5] Cf. *150 East 57th Street Corp.* v. *Porter*, 156 F. 2d 541 (E. C. A., 1946). Moreover, the terms of a 1947 amendment, discussed *infra*, pp. 5–6, clearly show congressional recognition that this exclusive jurisdiction continued after the termination date.

Jurisdiction of the Emergency Court of Appeals over any complaint arises, pursuant to § 204 (e) (1), when the court in which a civil or criminal enforcement proceeding is pending has granted the defendant leave to file in the Emergency Court of Appeals a complaint setting forth objections to the validity of any provision which the defendant is alleged to have violated, and the defendant has duly filed such a complaint. Prior to a 1947 amendment, § 204 (e) (1) provided that "Within thirty days after arraignment, or such additional time as the court may allow for good cause shown, in any criminal proceeding, and within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or of any price schedule effective in accordance with the provisions of section 206, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate. The court in which the proceeding is pending shall grant such leave with respect to any objection which it finds is made in good faith and with respect to which it finds there is reasonable and substantial excuse for the defendant's failure to present such objection in a protest filed in accordance with section 203 (a)." [6] Upon the filing of a complaint pursuant to and within thirty days from the granting of such leave, the Emergency Court of Appeals shall have jurisdiction to enjoin or set

[6] Section 203 (a) provides *inter alia* for the filing of protests to rent orders issued by the Administrator at any time after issuance. The denial by the Administrator of such a protest is reviewable by a complaint filed in the Emergency Court of Appeals pursuant to § 204 (a).

aside in whole or in part the provision of the regulation, order, or price schedule complained of or to dismiss the complaint . . . ."

However, the Supplemental Appropriation Act, 1948, approved July 30, 1947, amended § 204 (e) by striking out the first sentence of the foregoing provision and substituting the following: "Within sixty days after the date of enactment of this amendment, or within sixty days after arraignment in any criminal proceedings and within sixty days after commencement of any civil proceedings brought pursuant to section 205 of this Act or section 37 of the Criminal Code, involving alleged violation of any provision of any regulation or order issued under section 2 or alleged violation of any price schedule effective in accordance with the provisions of section 206 with respect to which responsibility was transferred to the Department of Commerce by Executive Order 9841,[1] the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated or conspired to violate."

Since responsibility for functions with respect to rent control was transferred by Executive Order 9841 to the Housing Expediter rather than to the Department of Commerce, the necessary effect of the foregoing amendment is to eliminate entirely the statutory right the defendant in the present case previously had to apply to the District Court for leave to file a complaint in the Emergency Court of Appeals. As a corollary, the latter court can no longer acquire jurisdiction pursuant to § 204 (e) over any complaint which defendant may desire to file with it to contest the validity of the second rent order.

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[1] 12 F. R. 2645.

We may now consider what effect the 1947 amendment, thus viewed, has upon the "exclusive jurisdiction" provision in § 204 (d), which was preserved by the saving clause of § 1 (b). If elimination of the complaint procedure of § 204 (e) as a remedy for those seeking to challenge rent orders meant the elimination of all provision for review by the Emergency Court of Appeals, it might be argued that preservation of the ban imposed by § 204 (d) on district court adjudication of the validity of rent orders would be a denial of due process to a defendant charged with a violation of an order.

However, the 1947 amendment left unimpaired the provision in § 203 (a) for review of rent orders by filing protests with the Administrator (*i. e.*, the Housing Expediter, as transferee of the Administrator's rent control functions). A denial of such a protest may be reviewed in the Emergency Court of Appeals by filing a complaint pursuant to § 204 (a). Prior to an amendment added by the Stabilization Extension Act of 1944, protests could be filed under § 203 (a) only within a period of sixty days after the issuance of the regulation or order sought to be challenged. Under the 1944 amendment, which is preserved unchanged for rent orders, this period was extended so that protests can be filed "At any time after the issuance" of the regulation or order, although the 1947 amendment expressly takes cognizance of the right of the United States or any officer thereof to dismiss any protest under § 203 on the ground of laches.[8]

Thus, it appears that the Emergency Court of Appeals may still be able to acquire jurisdiction to review rent orders, issued under the Price Control Act, by means

[8] ". . . Nothing herein shall be construed as in any way affecting the right of the United States or any officer thereof to dismiss any protest under section 203 of the Emergency Price Control Act of 1942, as amended, or defend against any complaint under section 204 (e) of such Act on the ground of laches."

of the protest and complaint procedure of §§ 203 (a) and 204 (a). Accordingly, the exclusive jurisdiction provision in § 204 (d) is not a meaningless anomaly so far as review of rent control orders is concerned, and it remains as substantial a barrier to review of the second rent order by the District Court as it was held to be in *Yakus* v. *United States*, 321 U. S. 414 (1944). There this Court ruled that defendants could not attack the validity of price regulations in a prosecution in a District Court even though the Emergency Price Control Act as then drawn made no provision for review by the complaint procedure later set up under § 204 (e) (and now abandoned so far as rent orders are concerned). The only judicial review then available required as a preliminary the filing of a protest to the Administrator under § 203 (a) within sixty days after the promulgation of the order or regulation. That statutory review procedure, whose constitutionality was upheld in the *Yakus* case, is still preserved to defendants charged with violations of rent orders issued under the Emergency Price Control Act of 1942.[9] If anything, the judicial review still available to such defendants is even broader than the procedure sustained in the *Yakus* case, since the sixty-day limitation on the filing of protests no longer applies to rent orders.

In view of the foregoing, we answer question (1) in the negative. In answer to question (2), the Emergency Court of Appeals no longer has jurisdiction pursuant to § 204 (e) to determine the validity of the second rent order.

[9] Of course the District Court can withhold judgment so that it may give effect to any determination by the Housing Expediter or the Emergency Court of Appeals that might result from the defendant's pursuit of this remedy.